No. 399.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION, TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS & ELECTRIC COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY OF PETITIONER TO RESPONDENTS' BRIEFS IN OPPOSITION.

OLIVER L. STONE,
3969 R. C. A. Building,
50 West 50th Street,
New York 20, New York.

GEORGE C. SCHOENBERGER, JR.,
Shell Building,
New Orleans 13, Louisiana.
Attorneys for Petitioner.

Of Counsel:
WILLIAM F. KENNEY,
3965 R. C. A. Building,
50 West 50th Street,
New York 20, New York.

WILLIAM W. WESTERFIELD, JR.,
Shell Building,
New Orleans 13, Louisiana.

INDEX.

Table of Cases.

	PAGE
Phillips Petroleum Co. v. *Wisconsin*, 347 U. S. 672 (1954)	1
Lake v. *LeJeune*, 226 La. 48, 74 So. 2d 899	2
Louis Werner Sawmill Co. v. *O'Shee*, 35 So. 919 at 921	2
Morgan's La. & T. R. & S. S. Co. v. *Stewart*, 119 La. 392, 44 So. 138, 143 (1907)	3
Wampler v. *Wampler*, 239 La. 315, 118 So. 2d 423 (1960)	4
Propper v. *Clark*, 337 U. S. 472	5
Thompson v. *Magnolia*, 309 U. S. 478	5
Commissioner v. *Sunnen*, 333 U. S. 591	6

Miscellaneous.

58 C. J. S., *Modern Civil Law*, p. 840 3

No. 399.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION, TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS & ELECTRIC COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY OF PETITIONER TO RESPONDENTS' BRIEFS IN OPPOSITION.

Respondents attempt to belittle the general importance of this case by ignoring the circumstance that the question of enforceability, in the posture of this proceeding, of necessity involves a conflict of laws question as to what law governs the enforceability of a rate schedule on file with the Federal Power Commission. In view of the *Phillips* decision* and its aftermath of the vast number of privately negotiated gas sales contracts which have been and will continue to be filed as "rate schedules", it is unrealistic to contend, as do respondents, that the question of what law governs construction and enforceability of such "rate schedules", is not of general importance.

---

* *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (1954).

The Court of Appeals saw fit to rely upon "general contract doctrine" which, in the light in which the case was briefed and argued to it, was but a characterization by the court of the federal substantive law concept which it felt should govern. True, the court said, but without citation of a single authority, that "Louisiana law, in this instance at least, does not differ from general contract doctrine". Thus the court assumed, without coming to grips with the problem, that Louisiana law was the same as general contract doctrine. Respondents claim that the court below actually applied Louisiana law.*

Assuming, *arguendo*, that the court below reached its conclusion by specifically applying Louisiana law, its conclusion is in conflict with the settled statutory and judicial law of Louisiana and should not be permitted to stand. If it does, it will create unnecessary friction between State and Federal judiciaries.

Respondents, though they accuse us of being confused as to the law of Louisiana in that we, they say, are incapable of distinguishing between sale and contract to sell, demonstrate their own complete misconception of the Louisiana doctrine of suspensive condition. Respondents argue, in effect, that if a contract "of sale" is subject to a suspensive condition, it can none the less be valid as a "contract to sell".

Respondents are under a serious misapprehension as to the suspensive condition in a *sale* and in a *contract to sell.***

---

* Br. for Government, p. 10; Br. for Texas Gas & Louisville, p. 14. In this latter brief it is said (p. 14) that the court below "under Louisiana law specifically" held the Atlantic contract to be enforceable.

** Respondents speak of the right to recover damages. That misses the issue of whether there was an enforceable contract to buy gas. Further, we deny that in Louisiana an action for damages would lie. *Louis Werner Sawmill Co.* v. *O'Shee*, 35 So. 919 at 921; *Lake* v. *LeJeune*, 226 La. 48, 74 So. 2d 899.

The Louisiana law is crystal clear that in either one, i.e., a sale or a contract to sell, fixed price is an absolute essential to enforceability. If in a purported sale the price is not fixed but is subject to uncertainty as to its fixing, the sale is of no effect until the price is fixed. If the document is a purported contract to sell (as the Atlantic contract was), but is subject to uncertainty as to the fixing of the price, it is of no effect as a contract to sell, unless and until the price is actually fixed. LSA-C.C. Arts. 2462, 2456 and 2021, and the authorities discussed in our petition, leave no doubt about this.

Respondents impute to us an argument we have never made, and then set about to destroy it. They in effect say that we say that if the Atlantic contract did not constitute a sale for 1953-1958 until price was fixed, it did not constitute a contract to sell. We have said no such thing. On the contrary, we have said that the Atlantic contract purported to be a contract to sell gas in the future and it was not enforceable as a contract to sell gas until the price was actually fixed (obviously it was not enforceable as a sale either).

Respondents have apparently read LSA-C.C. Art. 2021 and concluded that the requirement to meet and discuss price or to submit the matter to arbitration is an "*obligation*" and is not subject to a suspensive condition. But the point which they completely overlook is that the term "*obligation*" as used in Article 2021 and in the Civil Law, *is synonymous with contract.** That Article is not speaking

---

* The term "obligations" as used in the Louisiana Civil Code is synonymous with contract. *Morgan's La. & T. R. & S. S. Co. v. Stewart*, 119 La. 392, 44 So. 138, 143 (1907): "Civil obligations . . . are of two kinds: (1) . . . , (2) Such as arise from the consent of the parties who are bound by them which are called contracts or conventional obligations." See also 58 C. J. S., *Modern Civil Law*, p. 840, "The law of obligation has a broader meaning in the civil law than in the common law in that 'it signifies rights as well as duties. . . .'."

of the promises that may be made by either party to a contract but rather of the contract itself that is made to depend on an uncertain event. If, as in this case, the contract is a "promise to sell" it cannot be effective or enforceable as a promise to sell in the absence of a price. Here the naming of the price, the missing essential element of the promise to sell, is referred to the future and it is made to depend on an uncertain event. Thus the promise to sell is subject to a suspensive condition and cannot come into effect until the condition is satisfied. Although admittedly the parties promised to meet and discuss price at or before a specified time, and even to submit the price to arbitration if one party timely invoked it, yet the fixing of price was an "uncertain event" because neither the meeting of the parties nor the arbitrators was certain to result in fixed price.*

In summary, if the price, whether in a sale or contract to sell, is left to future negotiations, or to arbitration, the sale or contract to sell (whatever it purports to be) is subject to a suspensive condition and is of no effect whatever, and gives rise to no enforceable rights, until the condition is satisfied and the price is actually fixed. See the authorities cited in our petition and also: *Wampler* v. *Wampler*, 239 La. 315, 118 So. 2d 423 (1960).

Petitioner is quite serious in urging the propriety of this Court directing the court below to hold this case in abeyance pending determination by the Louisiana court of the single issue of Louisiana law on which, petitioner

---

* Texas Gas and Louisville say that it is not the law of Louisiana that a price mechanism must be immune from every possible frustration, even by causes beyond the whim or caprice of the parties. They fail to recognize that the feature which makes a contract subject to a suspensive condition is not that the condition is uncertain because of the whim or caprice of the parties *but simply because it is uncertain for whatever reason.*

submits, this case depends. It is true, as we readily recognized in our petition, that in *Propper* v. *Clark*, 337 U. S. 472, this Court said that the federal courts cannot allow difficulty of an issue of state law to deter them from deciding the case, when the issue comes to them in diversity and federal question cases—matters expressly charged to them by Congress.

The rationale of the *Propper* case, however, emphasizes the propriety of referral to the state court here. Our request is supported by *Thompson* v. *Magnolia*, 309 U. S. 478. In *Propper*, this Court said of referral to state courts:

> "This suggested procedure has been followed in order to avoid a decision on a Federal constitutional issue . . . and where the only issue in the case was one of state law, although Federal jurisdiction was based on the Bankruptcy Act, 11 U. S. C. A. 51 *et seq.* Thompson *v.* Magnolia Petroleum Co., 309 U. S. 478, 60 S. Ct. 628, 84 L. Ed. 876."

In *Thompson* v. *Magnolia*, the Court directed its trustee to file suit in the state court. Here suit in the state court is already pending, and there is every assurance that it will go to final determination as it presents to the state court, not a request for an advisory opinion, but a demand for $117,584.85, which petitioner sincerely believes is due it under its contract with Texas Gas for deliveries prior to June 7, 1954.

The only real resistance to the request for abstention offered in the Government's brief is the statement (p. 16):

> "If certiorari is denied, settled doctrines would dictate that the decision in this case would be binding in the Louisiana action."

Apart from the fact that this does not seem the appropriate place to raise the plea of *res judicata* concerning another

case pending before a different court, the authorities cited in support of that statement do not bear it out. In fact, one of the cited cases, *Commissioner* v. *Sunnen*, 333 U. S. 591, destroys the position asserted. Here the issue is the price of gas on June 7, 1954 when the Commission first assumed jurisdiction, whereas in the state court proceeding petitioner sues for the price of gas sold prior to June 7, 1954. Involved in the *Sunnen* case was tax on income under a patent contract. The Court held that a decision by the Board of Tax Appeals with respect to tax liability on income from a patent license contract was not binding in a subsequent case involving a different tax year, but presenting complete identity of facts, issues and parties.

For the reasons herein and in the petition for certiorari, it is respectfully submitted that the petition should be granted.

Respectfully submitted,

OLIVER L. STONE,
GEORGE C. SCHOENBERGER, JR.
Attorneys for Petitioner

Of Counsel:
WILLIAM F. KENNEY,
WILLIAM W. WESTERFIELD, JR.

October 17, 1961.